# US Supreme Court expected to weaken abortion rights

**A majority of Supreme Court justices may be inclined to overturn *Roe v Wade*. Susan Jaffe reports from Washington, DC.**

The US Supreme Court, now dominated by conservatives, heard arguments last week on the legality of a Mississippi law banning abortion after 15 weeks of pregnancy. However, the justices signalled that they are likely to do more than uphold the law. Instead of considering where to draw the viability line (the point when a fetus can survive outside the womb), the justices pivoted to a different question: does a woman have a constitutional right to abortion?

In 1973, the Supreme Court affirmed that right in *Roe v Wade*, the watershed decision that legalised pre-viability abortion across the USA. But the justices' sceptical questions indicate that *Roe* might no longer be sacrosanct.

"Based on what we saw, it seems like there's an appetite not just to change the rules on abortion, but to move pretty quickly to overrule *Roe v Wade*", said Mary Ziegler, a law professor at Florida State University College of Law, who has written extensively on the legal history of abortion. "There's the usual caveat that they could always change course but that just seems to be where things are headed."

Just hours after Mississippi's governor signed the abortion ban into law in 2018, lawyers representing what is the state's only abortion clinic, Jackson Women's Health Organization, sued to block it. The clinic won a lower court decision blocking the law and the state appealed. The ban allows exceptions for a medical emergency or severe fetal abnormality but not for cases of incest or rape. While the law has yet to take effect, the case, known as *Dobbs v Jackson Women's Health Organization*, reached the Supreme Court where three justices appointed by former President Donald Trump appear inclined to fulfil his campaign promise that his appointees would roll back abortion rights.

To do so would not only abolish the decades-old "woman's right to choose, the right to control her own body", warned Justice Sonia Sotomayor, appointed by former President Barack Obama. It could also, irreparably damage the credibility of the Court: "will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?"

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In 1992, the Supreme Court ruled in *Planned Parenthood of Southeastern Pennsylvania v Casey* that states could regulate abortion only if they did not put an "undue burden" or obstacles in the way of women seeking abortions before fetal viability. States enacted hundreds of regulations in the years that followed, including mandatory ultrasound of the uterus, counselling that includes medical misinformation, a waiting period before the procedure, prohibiting public and private insurance plans from paying for abortion, and limiting when during the pregnancy it can be provided.

Instead of defending the state's 15-week viability limit, Scott Stewart, Mississippi's solicitor general, began his argument by immediately attacking the two landmark abortion decisions head-on. "*Roe versus Wade* and *Planned Parenthood versus Casey* haunt our country", said Stewart. "They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise. For 50 years, they've kept this Court at the center of a political battle that it can never resolve."

Justice Brett Kavanaugh, a Trump appointee, later helped Stewart clarify his point: "as I understand it, you're arguing that the Constitution is silent and, therefore, neutral on the question of abortion? In other words, that the Constitution is neither pro-life nor pro-choice on the question of abortion but leaves the issue for the people of the states or perhaps Congress to resolve in the democratic process? Is that accurate?"

"Right", Stewart answered, explaining that whether and when abortion should be allowed is a matter for each state to decide, without directives from the Constitution.

Sotomayor reminded Stewart "there's so much that's not in the Constitution…and here in *Casey* and in *Roe*, the Court said there is inherent in our structure that there are certain personal decisions that belong to individuals and the states can't intrude on them. We've recognised them in terms of the religion parents will teach their children. We've recognized it in their ability to educate at home if they choose…We have recognized that sense of privacy in people's choices about whether to use contraception or not. We've recognized it in their right to choose who they're going to marry. I fear none of those things are written in the Constitution. They have all…been discerned from the structure of the Constitution. Why do we now say that somehow *Roe* and *Casey* are so unusual that they must be overturned?"

## Let states decide

Kavanaugh pointed out a key difference between previous precedent-setting decisions supporting individual


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rights and the current case: "the other side would say there are two interests at stake, that there's also the interests in fetal life at stake as well", he told US Solicitor General Elizabeth Prelogar, who represented the Biden Administration in support of the Jackson clinic. "You say the existing framework—that's your word—accommodates both the interests of the pregnant woman and the interests of the fetus. And the problem, I think the other side would say, and the reason this issue is hard, is that you can't accommodate both interests... One interest has to prevail over the other at any given point in time, and that's why this is so challenging."

Kavanaugh reiterated his suggestion that the arbiter should be the states, "and there will be answers in Mississippi and New York and different answers in Alabama and California because...the people of those states might value those interests somewhat differently. Why is that not the right answer?"

"It's not the right answer because the Court correctly recognized that this is a fundamental right of women, and the nature of fundamental rights is that it's not left up to state legislatures to decide whether to honor them or not", said Prelogar.

Chief Justice John Roberts, known as a consensus builder, tried to steer the debate back to the viability line question. His effort drew little interest from the other justices.

Justice Amy Coney Barrett, a Trump appointee who joined the Court a year ago, suggested separating the challenges of pregnancy and parenting. All 50 states have "safe haven" laws that allow a woman to terminate parental rights by putting her baby up for adoption, said Barrett, who has seven children, including two who were adopted. Adoption would remove the burden of unwanted parenting responsibilities that impact work life and financial independence. "Why don't the safe haven laws take care of that problem?" she asked Julie Rikelman, an attorney with the Center for Reproductive Rights, who represented the Jackson clinic.

"We don't just focus on the burdens of parenting, and neither did *Roe* and *Casey*", said Rikelman. "Instead, pregnancy itself is unique. It imposes unique physical demands and risks on women and, in fact, has impact on all of their lives, on their ability to care for other children, other family members, on their ability to work. And, in particular, in Mississippi, those risks are alarmingly high. It's 75 times more dangerous to give birth in Mississippi than it is to have a pre-viability abortion, and those risks are disproportionately threatening the lives of women of color."

## What's next?

The Court is expected to issue a decision in the Mississippi case by June, most likely after it decides another abortion case involving a Texas law that took effect in September, 2021, prohibiting the procedure after about 6 weeks of pregnancy, with exceptions only for medical emergencies. The issue in that case, *Whole Women's Health v Jackson*, is the law's unusual enforcement mechanism. It allows anyone to file a lawsuit against a woman who obtains an abortion in Texas after about 6 weeks of pregnancy, as well as the doctor who provided it or any individuals who assisted them. If the defendants are found guilty, they each must pay the person who sued US$10 000. The threat of such lawsuits has effectively stopped most abortions in Texas. If the Supreme Court upholds the Texas and Mississippi laws, dozens of other states are poised to enact similar restrictions.

If *Roe v Wade* is overturned or substantially weakened, 26 states are "certain or likely to ban abortion", according to an analysis by the Guttmacher Institute. By contrast, only 15 states and the District of Columbia have adopted laws that guarantee a right to abortion. The US House of Representatives passed a similar law, the Women's Health Protection Act, in September, 2021, but it currently lacks enough support to pass in the Senate.

"We already have seen what happens when you have an incredibly restrictive state next to a more ideal state", said Colleen McNicholas, an obstetrician-gynaecologist and chief medical officer at Planned Parenthood of the St Louis Region in Missouri. She also works at the Hope Clinic for Women, about 12 miles away in southern Illinois, which has less restrictive abortion rules than Missouri.

When Illinois Governor JB Pritzker signed abortion access protection legislation into law in 2019, he said it "ensures that women's rights do not hinge on *Roe v Wade* or the whims of an increasingly conservative Supreme Court in Washington".

Since the Texas law took effect, McNicholas said, "our southern Illinois clinic has seen a number of patients coming all the way from Texas, driving 9 or 10 hours to access abortion care". More patients are also coming from the states between Texas and Illinois, increasing the wait times for appointments, she said. Planned Parenthood and the Hope Clinic recently announced a $10 million renovation to accommodate the influx of out-of-state patients.

*Susan Jaffe*